SUPREME COURT, U.S.
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No. _____

In The

Supreme Court of the United States

KEELER DIE CAST,

Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA and NATIONAL LABOR RELATIONS BOARD,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER A UNION MAY REQUIRE EMPLOYEES TO SIGN A PUBLIC "SECOND PETITION" OF SUPPORT AS A PREREQUISITE TO THE HOLDING OF A PROPERLY-PETITIONED-FOR-AND-SCHEDULED *SECRET* BALLOT ELECTION, AND THEN DISTRIBUTE THE RESULTING FALSE PORTRAIT OF SUPPORT AS ELECTION PROPAGANDA.

PARTIES TO THE PROCEEDINGS

Petitioner, Keeler Die Cast ("Keeler") was Petitioner and Cross-Respondent in the Court of Appeals for the Sixth Circuit. Respondent, International Union, United Automobile Aerospace Agricultural Implement Workers of America ("Union") was Intervenor in the Court of Appeals for the Sixth Circuit and the National Labor Relations Board ("Board") was the Respondent and Cross-Petitioner in the Sixth Circuit Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI

Keeler Die Cast, a Michigan Corporation, petitions this Court for a Writ of Certiorari to review the Judgment of the Court of Appeals of the Sixth Circuit.

OPINIONS BELOW

The Opinion of the panel of the Court of Appeals for the Sixth Circuit (Circuit Judges Daughtrey and Moore and District Judge Stafford, sitting by designation) is reported at 185 F.3d 535 (6th Cir. 1999), and is reprinted in the Appendix to this Petition ("App.") at 1a. The Opinion of the National Labor Relations Board is reported at 325 N.L.R.B. No. 79 (1998), and is reprinted at App. 14a. The Order of the Court of Appeals denying the Petitioner's Petition for Rehearing and for En Banc Review is reprinted at App. 23a.

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on July 8, 1999. The Court of Appeals for the Sixth Circuit denied Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc on September 17, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act ("N.L.R.A.") 29 U.S.C. § 157, provides as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 9 of the N.L.R.A., 29 U.S.C. § 159(c)(1) provides as follows:

> Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board –
>
> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer

a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a): the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board find upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

STATEMENT OF THE CASE

The Union's misconduct tainted the required "laboratory conditions" of the representation election at Keeler Die Cast. Several weeks before the election in this case, the Union circulated a "second petition" in the plant for signature by employees. The Union organizer expressly told employees both orally and by written memo that if a clear majority of them did not sign the "second petition," the Union would withdraw from and cancel the properly petitioned for, scheduled secret ballot election.

Over 100 copies of the signed second petition were then distributed to employees the day before the election, after several employees were directly pressured and harassed by the Union to sign it. The subsequent broad distribution of the signed second petition the day before the election shocked and angered employees, many of whom were under the impression their names would not be released.

The rationale for distributing the signatures is both clear and offensive given the circumstances and the condition of signature placed by the Union on employees' right to participate in a secret ballot election. The Union told employees that the petition was a necessary prerequisite to the election and that their names would not be made public. That is a false and offensive inducement to sign what essentially became nothing more than Union propaganda, albeit with the string of the secret ballot election itself attached.

The publication of a false portrait of employee support is objectionable conduct by the Union and a breach of the longstanding "laboratory conditions" standard. This is especially true where, as here, the Union obtained the false portrait of support by telling employees that if they did not sign the so-called "second petition" openly pledging their support, no secret ballot election would be held. This forced employees, whether they actually supported the Union or not, to sign the petition just to keep their right to vote. Both the National Labor Relations Board and the Sixth Circuit Court of Appeals, however, condoned this misconduct by the Union. Although such conduct effectively makes the statutorily required secret ballot election an open one, and an employer would

certainly be held in violation of the Act if it was to attempt such an "end run" around the statutory process, the Union's misconduct has been validated to date by the judicial system.

In this context, this matter is now presented to the United States Supreme Court. This case satisfies three significant reasons for granting a writ of certiorari.

REASONS FOR GRANTING THE WRIT

This case presents the following: (1) the decision is in conflict with this Court's own precedent; (2) the decision below has created a conflict in the Sixth Circuit; and (3) the case plainly presents significant issues of nationwide importance. Together, these grounds present a compelling case for certiorari.

I. The Conflict With This Court's Precedent.

The decision of the Sixth Circuit conflicts with this Court's decision in *N.L.R.B. v. Savair Manufacturing Co.*, 414 U.S. 270 (1973). The Court in *Savair* held that a union is prohibited from portraying a false portrait of employee support during an election campaign. In *Savair*, the Union obtained this false portrait by inducing employees to sign a document they otherwise would not have signed. The particular inducement in *Savair* was an offer to waive a nominal ten-dollar initiation fee for joining the union.

In the present case, the International Union, United Automobile Aerospace Agricultural Implement Workers of America ("Union") distributed a false portrait of

employee support in the form of a second petition on the day before the secret ballot representation election was scheduled to take place. The Union induced employees by, among other methods, telling them if they did not sign the petition, there would be no election and they would effectively be disenfranchised. This caused employees who would not have otherwise signed the document to sign it, thus creating the false portrait of support condemned in *Savair*. The inducement here was the threat of disenfranchisement if employees did not sign it. Thus, as more fully described below, the only difference between *Savair* and this case is the nature of the device used as an inducement. This difference is not material to *Savair*'s holding that a false portrait of support is objectionable, nor does it preclude application of that precedent to this case.

In *Savair*, the Supreme Court held the painting of a false portrait of employee support was violative of the National Labor Relations Act ("N.L.R.A." or the "Act") because it was inconsistent with the policy of fair elections and free choice of bargaining representatives. *Savair*, 414 U.S. 270, 277. For the following reasons, the Court found this to interfere with the employees' exercise of their Section 7 rights even though an employee was ultimately free to vote against the union and might intend to:

(1) The slips indicated support of the union and could be used as a campaign tool by the union. *Id.* at 277;

(2) After signing a slip, an employee might feel obligated to vote for the Union. *Id.* at 278;

(3) If the Union received overwhelming support prior to the election, it might treat the recognition slips as

authority to conduct collective bargaining without an election. *Id.* at 280; and

(4) Employees might sign slips because of fear that if he or she did not, the employee would face a wrathful union, if the union won. *Id.* at 281.

As discussed below, every one of the Court's reasons for deeming this conduct objectionable in *Savair* are present in this case, regardless of the difference in the inducement used to obtain the signatures. In *Savair,* the triggering inducement itself, the $10 waiver, was not material to the outcome of the case; the important point is that the Union used a means to obtain employee vouchers of support it would not have otherwise obtained. Any means, monetary or otherwise, sufficient to "buy" signed affirmations of support which would not otherwise be forthcoming, meets the *Savair* test for objectionable conduct, because it is the *false* portrait of support, and not necessarily the exact device used to obtain it, that constitutes the objectionable conduct here and in *Savair.*

(1) ***The slips indicated support of the union and could be used as a campaign tool by the union.***

Although the Sixth Circuit claimed the Union used the second petition to ascertain the level of its support among employees prior to the date of the election, the mass distribution of the petition on the day before the election clearly shows action entirely antithetic to this conclusion. Additionally, the petitions lauded the virtues of joining the Union and stated voting for the Union was a vote for justice, dignity, and a voice in our workplace. The petitions were not merely instruments to poll the Union's support, but rather campaign tools used by the Union in the most obvious fashion.

(2) ***After signing a slip, an employee might feel obligated to vote for the Union.***

In *Savair*, the Court stated "while it is correct that the employee who signs a recognition slip is not legally bound to vote for the union and has not promised to do so in any formal sense, certainly there may be some employees who would feel obliged to carry through on their stated intention to support the union." *Savair*, 414 U.S. 270 at 277-278. In the present case, the petitions stated at the top:

> We are the Union! We, the undersigned employees of Keeler Die Cast are voting YES on election day. We have heard all the company's arguments and accusations and we have listened to their promises. But we are standing up for ourselves, our families and our futures.

At the bottom of the petition it stated that the employees' signatures showed "my commitment." This obligatory language most likely compelled employees to vote for the Union against their wishes. In the present case, however, we may never know employees' motivation in voting for the Union. The N.L.R.B. Hearing Officer did not allow direct testimony from the employees regarding their *subjective* reasoning. The Sixth Circuit, not surprisingly, concluded the Company "could produce no evidence that any employee felt pressure to vote in favor of union representation as a result of the poll." Keeler Die Cast, in fact, was not allowed to produce any tangible subjective evidence. Despite this lack of testimony, the *objective* coercive nature of the second petition standing alone tainted the fairness of the election. "Any procedure requiring a "fair election must honor the right of those who oppose a

union as well as those who favor it." *Savair*, 414 U.S. 270 at 278. Those opposing the union, or even those who were at the time undecided as to their preference, were required to sign this petition stating their intention to vote for the Union or else not be afforded the opportunity to vote at all. This conduct infringed on employees' right to a private, secret ballot election and to deliberately consider their choice in that election all the way up to the vote itself.

(3) ***If the Union received overwhelming support prior to the election, it might treat the recognition slips as authority to conduct collective bargaining without an election.***

The Court in *Savair*, citing to *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575 (1969), stated the "solicitation of authorization cards may serve one of two ends. Of course, when an election is contemplated, an employee does not become a member of the union merely by signing a card. But prior to the election, if the union receives overwhelming support, the pro-union group may decide to treat the union authorization cards as authorizing it to conduct collective bargaining without an election." *Savair*, 414 U.S. 270 at 280. The Sixth Circuit in the present case acknowledged that the Union can poll the employees' prior to the election and further stated an "employer may not conduct a pre-election poll of its employees." The Court emphatically "endorsed the N.L.R.B. position that such pre-election polling by the union is not inherently coercive." This is in direct conflict with the Supreme Court's reasoning in *Savair*. "The Board in its supervision of union elections may not sanction procedures that cast their weight for the choice of a union against a nonunion

shop . . . " *Id.* This is the consequence, however, of the Sixth Circuit's decision.

(4) ***Employees might sign slips because of the fear that if he or she did not, the employee would face a wrathful union if the union won.***

> If we respect, as we must, the statutory right of employees to resist efforts to unionize a plant, we cannot assume that unions exercising powers are wholly benign towards their antagonists whether they be nonunion protagonists or the employer. The failure to sign a recognition slip may well seem ominous to nonunionists who fear that if they do not sign they will face a wrathful union regime, should the union win.

Id. 280-281. This same fear was present in this case given the Union's coercive tactics.

Although the union in *Savair* offered an economic inducement with a promise to waive the initiation fee to all employees who signed a recognition slip, this amount was a nominal ten dollars. The Court's four reasons for finding unlawful conduct were not tied to the financial burden placed upon employees, but rather were directed at the Union's painting of "a false portrait of employee support during its election campaign." *Id.* at 277.

The Fifth Circuit made this same distinction stressing the false portrait of employee support in *N.L.R.B. v. Roney Plaza Apartments*, 597 F.2d 1046 (5th Cir. 1979). "[T]he Court evidently considers the impact of such misrepresentations significant. . . . But it is not required that the Board, or the courts, give free rein to egregious and deceitful practices designed to have impact upon the minds of employees choosing whether or not to authorize

union representation. Protecting the organizational rights of workers does not require such an extreme position." *Id.* at 1053-1054.

The Sixth Circuit panel took such an extreme position in the present case dismissing *Savair*'s application summarily, stating "the actions of the UAW in the present case do not involve the inducements and coercion described in *Savair Mfg. Co.*" The panel, however, ignored the Union's blatant portrayal of an induced false portrait of employee support one day before the election. The Sixth Circuit's decision is instead closely aligned with the reasoning of the *dissent* in *Savair*, which found it "rational for the Board to conclude . . . that the decision of the Union to waive small fees was not coercive within the meaning of § 7." *Id.* at 290. The dissent stressed the Board's "wide degree of discretion to ensure the fair and free choice of bargaining representatives." *Id.* at 282. The majority court in *Savair*, however, held that the Board overreached its wide discretion and the Union's inducements encroached on the employees' fair and free choice because nonunionists who signed the false portrayal of support felt obligated to support the Union. Again, the Sixth Circuit in the present case ignored the majority and followed the *Savair dissent*, which argued:

> The express preference in the N.L.R.A. for secret ballot elections assumes that voters may act differently in private than in public, and ordinarily guarantees to employees the ability to make a secret choice.

Id. at 287.

This assumption is in direct conflict with the majority decision in *Savair* which held an induced false portrayal of employee support unlawful, regardless of an individual's *potential* ability to privately change their vote later. The Sixth Circuit panel in the instant case simply ignored the majority's rationale in *Savair* and instead adopted the dissent's unsuccessful argument as their own. In so doing, they placed undue emphasis on the exact nature of the inducement used in *Savair* – a $10 value – which is not the heart of the *Savair* opinion and which is truly of lesser value than the inducement in this case: the right to vote in the scheduled secret ballot election itself.

II. Conflict Within The Sixth Circuit Court Of Appeals.

The Sixth Circuit Court of Appeals' decision not only directly conflicts with this Court's decision in *Savair*, but also conflicts with the Sixth Circuit's decision in *N.L.R.B. v. Gormac Custom Manufacturing*, 190 F.3d 742 (1999); 1999 U.S. App. LEXIS 20990, which relied upon *Savair*. *Gormac* presented an *almost identical* set of circumstances as the present case, but resulted in a *totally opposite* conclusion. The Sixth Circuit in *Gormac* held that publication of a false petition of support, induced by a promise to obtain an election, *was* detrimental to the secret ballot process and a "deliberately deceitful tactic," articulating the following reasoning:

> ***"Why a 'secret ballot' and why was this of first importance? Simply because the integrity and confidentiality of secret voting is at the heart of a democratic society, and this includes industrial democracy as well. The 'revelation' that a***

> ***majority of identified employees will be voting a certain way in an election seems to us to be of substantial adverse effect in a secret ballot election, especially if the 'revelation' is untrue."*** *Gormac*, 1999 U.S. LEXIS 20990 at *20-21.
>
> ***"The flyer represented, in effect, that the election was only a matter of verifying a demonstrated large union majority who were voting 'yes' as evidenced by their own signatures – thirty-one out of an eligible voter total of forty-five. This indication that thirty-one of forty-five votes were committed to vote 'yes' may well have influenced the six employees who did not vote. It is quite possible that these six voters saw the flyer, concluded that their vote would not matter since it was already a foregone conclusion that the Union would win, and decided not to vote."*** *Gormac* at *20.
>
> ***"If, indeed, union representatives promised employees that . . . (the second petition's) purpose was merely to be used to obtain a fair election, . . . then such use as was actually made by the union in this case would be a gross misrepresentation and a deliberately deceitful tactic. We would conclude, that the union was guilty of pervasive deception and an artful misrepresentation, akin to forgery, enough to interfere with the free and fair choice of the employees."*** *Gormac* at *26-27.

The *Gormac* Court relied upon the five-factor test in *Mitchellace, Inc. v. N.L.R.B.*, 90 F.3d 1150, 1155 (6th Cir. 1996) in deciding whether a union's petition asserting greater support than the Union actually had affects election results. The five factors to consider are (1) the timing of the misrepresentation; (2) whether the employer was

aware of the situation and had an opportunity to respond; (3) the extent of the misrepresentation; (4) whether the source of the misrepresentation was identified; and (5) whether there is evidence that employees "actually were affected" by the misrepresentation. These five factors are directly applicable to *Keeler Die Cast*.

A. Timing.

The Union in *Keeler Die Cast* publicized the petition on the day before the election. While the timing in *Gormac* was several hours before that election, the Court stated "we have held that a misrepresentation made two days before the election warranted a new election." *Gormac* at *14, quoting *Hub Plastics*, 52 F.3d at 612-13.

B. Ability to Respond.

Keeler Die Cast was not aware of the petition and did not have an opportunity to respond to the Petition before the election.

C. Extent of Misrepresentation.

In *Gormac*, the Court emphasized two misrepresentations made by the Union: (1) signatures would remain confidential; and (2) signatures would be used only for the purpose of getting an election. *Keeler Die Cast* is exactly like *Gormac:* (1) there were several Keeler Die Cast employees who had been promised that their signatures would be confidential; and (2) the Union told Keeler Die

Cast employees simply that they needed to sign the second petition for an election to be held. Both of the misrepresentations, which outraged the Court in *Gormac*, were present in *Keeler Die Cast*, but ignored by its panel.

D. Source of Misrepresentation.

Keeler Die Cast argued that the petition circulated by the Union created a "false sense of the extent of union support" which "painted a false portrait of employee support during its election campaign." Citing *Savair*, the Court in *Gormac* concluded the "misrepresentation of creating a false sense of the extent of union support is serious as well." *Gormac*, at *18. The Court in *Keeler Die Cast*, however, summarily dismissed *Savair*'s applicability stating "the present case do(es) not involve the inducements and coercion described in *Savair Mfg. Co.*" *Savair*, however, is as applicable and controlling to *Keeler Die Cast* as it is to *Gormac*.

E. Effect of Misrepresentation.

There was evidence that Keeler Die Cast employees were affected by the misrepresentations despite the Hearing Officer's exclusion of what he called "subjective" evidence. The *Gormac* court concluded "as for the second misrepresentation, the false picture of the extent of union support that was created in probability had an impact on the election." *Gormac*, at *20. If the same reasoning is applied, this must also be true of the *Keeler Die Cast* election.

F. The Importance of "The Secret Ballot."

The parties in both *Gormac* and *Keeler Die Cast* signed a Stipulated Election Agreement which stated "A secret-ballot election shall be held under the supervision of the Regional Director in the unit . . . at the agreed time and place, under the Board's Rules and Regulations." The Court in *Gormac* stressed the importance of this stipulated agreement between the employer and the union:

> Why a 'secret ballot' and why was this of first importance? Simply because the integrity and confidentiality of *secret* voting is at the heart of a democratic society, and this includes industrial democracy as well. The 'revelation' that a majority of identified employees *will be voting* a certain way in an election seems to us to be a substantial adverse effect in a secret ballot election, especially if the 'revelation' is untrue.

Gormac, at *20-21. This same argument presented by *Keeler Die Cast* (based on the same language in the Stipulated Election Agreement) was ignored by its panel. In *Gormac*, the flyer represented that 31 out of 45 employees were voting yes. The Court in *Gormac* stated:

> The flyer represented, in effect, that the election was only a matter of verifying a demonstrated large union majority who were voting 'yes' as evidenced by their own signatures – thirty-one out of an eligible voter total of forty-five. This indication that thirty-one of forty-five votes were committed to vote 'yes' may well have influenced the six employees who did not vote. It is quite possible that these six voters saw the flyer, concluded that their vote would not matter since it was already a foregone conclusion

> that the Union would win, and decided not to vote.

Gormac, at *20. Similarly in *Keeler Die Cast*, 120 out of 181 eligible voters signed the second petition stating they were voting yes. The *Gormac* court remanded the case for an evidentiary hearing on this issue. While Keeler Die Cast was offered an evidentiary hearing, it requested the Court remand the case because the N.L.R.B. prohibited testimony on the actual reasons why the employees signed the falsely inflated portrait of support. The *Keeler Die Cast* panel cavalierly concluded that the false portrait could not have had any impact on the election. "Furthermore, the company could produce no evidence that any employee felt pressured to vote in favor of union representation as a result of the poll so that the outcome of the election was influenced by the polling." This conclusion is completely inconsistent with *Gormac* and *Savair*, and at the very least requires a remand for the presentation of such evidence, which the N.L.R.B. hearing officer wrongfully excluded.

G. Pre-Election Polling.

Footnote 10 of *Gormac* states that the Court has a "long-standing skepticism towards pre-election polling by either side." The *Keeler Die Cast* panel did not exhibit this skepticism. The Court still concluded in *Keeler Die Cast* that "An *employer* may not conduct a pre-election poll of its employees because such activity involves inherent coercion . . . [W]e have endorsed the N.L.R.B. position that such pre-election polling *by the union* is not inherently coercive." This conclusion is inapposite given

the holding in *Gormac* and its "skepticism towards . . . polling by *either* side."

H. The Union Engaged in "Gross Misrepresentation" by "Using a Deliberately Deceitful Tactic."

The Court in *Gormac* held that the Union was guilty of "pervasive deception and artful misrepresentation" in circulating a false petition of support before the election:

> If, indeed, union representatives promised employees that . . . (the second petition's) purpose was merely to be used to *obtain* a fair election, . . . then such use as was actually made by the union in this case would be a gross misrepresentation and a deliberately deceitful tactic. We would conclude, that the union was guilty of pervasive deception and an artful misrepresentation, akin to forgery, enough to interfere with the free and fair choice of the employees.

Gormac, at *26-27. That is exactly what happened in *Keeler Die Cast*. Union representatives promised Keeler Die Cast employees that their names would not be made public. The Union also clearly told employees the purpose of their signatures was to obtain an election. Even worse, employees were told they ***MUST*** sign to keep the election they had already lawfully obtained. Based on these facts, the Sixth Circuit should have concluded that the Union at Keeler Die Cast also engaged in gross misrepresentation by using a false second petition, a deliberately deceitful tactic.

III. The National Importance Of This Case.

This case is of nationwide importance because the "second petition" is a recurring issue during union organizing campaigns under the National Labor Relations Act. The AFL-CIO and its member unions have pledged to increase their organizing efforts. Thus, the lawfulness of second petitions is an issue that will necessarily affect, on a nationwide basis, the rights of those employees who choose to engage in activities in support of labor organizations and those who choose to refrain from such activities.

If the Sixth Circuit's decision stands, unions across the nation will be allowed to usurp the protection of the secret ballot election established by the N.R.L.A. by forcing employees to make public their support of the union. Additionally, the Sixth Circuit decision allows unions to solicit these signatures with coercive tactics, such as threatening to cancel a properly petitioned-for-and-scheduled secret ballot election. If the Sixth Circuit decision stands, unions will have free reign to require a super majority of employees to sign a second petition in order to keep their right to vote, and then publish the resulting false portrait of employee support obtained in this deceptive manner. This result is directly in conflict with *Savair*'s condemnation of the use of such false portraits of support.

CONCLUSION

For all of the foregoing reasons, the Petition should be granted and the Court's decision reversed.

Respectfully submitted,

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Date: December 8, 1999

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KEELER DIE CAST, *Petitioner/Cross-Respondent,*	)	
v.	)	Nos. 98-5536/5635
NATIONAL LABOR RELATIONS BOARD, *Respondent/Cross-Petitioner,*	)	
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO, *Intervenor.*	)	

On Petition for Review and Cross-application for Enforcement of an Order of the National Labor Relations Board.
No. 7-CA-40259

Argued: June 8, 1999

Decided and Filed: July 8, 1999*

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* This decision was originally issued as an "unpublished decision" filed on July 8, 1999. On July 22, 1999, the court designated the opinion as one recommended for full-text publication.

Before: DAUGHTREY and MOORE, Circuit Judges; STAFFORD** District Judge.

COUNSEL

ARGUED: David E. Khorey, VARNUM, RIDDERING, SCHMIDT & HOWLETT, Grand Rapids, Michigan, for Petitioner. Richard A. Cohen, NATIONAL LABOR RELATIONS BOARD, OFFICE OF THE GENERAL COUNSEL, Washington, D.C., for Respondent. Nancy Schiffer, ASSOCIATE GENERAL COUNSEL, INTERNATIONAL UNION, UAW, Detroit, Michigan, for Intervenor. **ON BRIEF:** David E. Khorey, VARNUM, RIDDERING, SCHMIDT & HOWLETT, Grand Rapids, Michigan, for Petitioner. Richard A. Cohen, John D. Burgoyne, NATIONAL LABOR RELATIONS BOARD, OFFICE OF THE GENERAL COUNSEL, Washington, D.C., for Respondent. Nancy Schiffer, Jordan Rossen, ASSOCIATE GENERAL COUNSEL, INTERNATIONAL UNION, UAW, Detroit, Michigan, for Intervenor.

OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge. Following a decision of a panel of the National Labor Relations Board finding Keeler Die Cast guilty of an unfair

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** The Honorable William H. Stafford, United States District Judge for the Northern District of Florida, sitting by designation.

labor practice for refusing to bargain with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), the company has petitioned for review of the Board ruling. The Board in turn requests that we enforce the entered administrative order. Because we conclude that Keeler failed to carry its heavy burden of establishing irregularities in the union representation election at Keeler's Stevens Street facility in Grand Rapids, Michigan, we deny the company's petition for review and grant the NLRB's application for enforcement.

FACTUAL AND PROCEDURAL BACKGROUND

On October 7, 1996, the UAW filed with the Board a petition for a certification election at the Stevens Street plant of Keeler Die Cast in Grand Rapids, Michigan. The union and the employer then entered into a "Stipulated Election Agreement" in which the parties agreed, among other things, that the appropriate collective bargaining unit for the representation election consisted of:

> All full-time and regular part-time production and maintenance employees including all leadmen, quality auditors, and material handling clerks employed by the Employer at its facility located at 236 Stevens Street, S.W., Grand Rapids, Michigan; BUT EXCLUDING all office clerical employees, quality analysts, technical employees, professional employees, casual employees, guards and supervisors as defined in the Act.

The representation election was held on December 12, 1996, and 174 of the eligible 181 employees voted. Of

those casting ballots, 95 employees supported union representation and 79 employees voted against such representation. Although none of the votes cast were challenged by either Keeler or the UAW, the employer later filed six objections to the union's pre-election conduct. A hearing was conducted on those objections and the hearing officer prepared a report and recommendation to the Board suggesting that all objections be overruled and that a certificate of representation issue. Despite the hearing officer's determinations, Keeler refused to bargain with the UAW. The union thus lodged unfair labor practice charges against the company pursuant to the provisions of sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (5). A panel of the Board found no merit to any of Keeler's contentions and ordered the employer to bargain with the UAW. From that determination, the company petitions for review. The Board itself also petitions this court for enforcement of its prior order.

DISCUSSION

Standard of Review

We have repeatedly recognized that the Board "has broad discretion in resolving representation disputes." *Colquest Energy, Inc. v. NLRB*, 965 F.2d 116, 119 (6th Cir. 1992). Consequently, when reviewing a Board decision in such a matter, we must ascertain only whether "the Board abused its discretion in resolving the dispute." *Id.* Moreover, a finding by the Board "that an election was conducted under fair conditions will not be disturbed on appeal where there is substantial evidence in the record

as a whole to support its conclusions." *Mitchellace, Inc. v. NLRB*, 90 F.3d 1150, 1155 (6th Cir. 1996).

The burden of proving the unfairness of a representational election conducted under Board supervision is a heavy one and falls upon the party seeking to overturn the election results. *See Dayton Hudson Dep't Store Co. v. NLRB*, 987 F.2d 359, 363 (6th Cir. 1993). The party challenging the election outcome must demonstrate "not only that the unlawful acts occurred, but also that they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election." *Mitchellace, Inc.*, 90 F.3d at 1155 (citations and internal quotation marks omitted).

Challenges to Union's Pre-election Activities

1. Circulation of Second Petition

Keeler first challenges the propriety of union sympathizers circulating a petition seeking declarations of union support in the weeks preceding the representation election. The employer contends that the petition amounted to pre-election polling and was inherently coercive. According to the company, the objectionable character of the petition was heightened by the union's decision to publish the names of those employees who had presumably indicated their union support by signing the statement of intent.

In support of its position, Keeler cites this court to the Supreme Court decision in *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973), which condemned the pre-election tactic of waiving an "initiation fee" for employees who signed "recognition slips," thus making those workers

union members prior to the actual election. *See id.* at 272-73. In contrast, the actions of the UAW in the present case do not involve the inducements and coercion described in *Savair Mfg. Co.*

Here, the union, in an effort to ascertain the level of its support among employees prior to the date of the election, simply asked employees to sign sheets that stated clearly at the top:

> We are the Union! We, the undersigned employees of Keeler Die Cast are voting YES on election day. We have heard all the company's arguments and accusations and we have listened to their promises. But we are standing up for ourselves, our families and our futures. YES for justice. YES for dignity. YES for a voice in our workplace.

Furthermore, the sheets contained the statement at the bottom, "I understand that my signature will be used in a leaflet or in any other way that shows my commitment to taking charge of my own future."

An *employer* may not conduct a pre-election poll of its employees because such activity involves inherent coercion by an entity "with . . . almost absolute control over employment, wages, and working conditions. . . . " *Louis-Allis Co. v. NLRB*, 463 F.2d 512, 517 (7th Cir. 1972). However, we have endorsed the NLRB position that such pre-election polling by the union is not inherently coercive. *See Kusan Mfg. Co. v. NLRB*, 749 F.2d 362, 364 (6th Cir. 1984); *see also Maremont Corp. v. NLRB*, ___ F.3d ___, 1999 WL 326326 at *4-5 (6th Cir. May 25, 1999) ("Vote Yes" petition circulated among employees, with notice that names of those who sign may be published in union

handbill, does not interfere with free and fair choice of employees). Nevertheless, "an employer may successfully challenge a representation election if he shows that pre-election polling by the union *in fact* was coercive and *in fact* influenced the result of the election." *Kusan Mfg. Co.*, 749 F.2d at 365 (emphasis in original) (citation omitted). Keeler can make no such showing in this matter.

Indeed, the UAW had absolutely no interest in coercing employees to sign the petition because such pressure would actually have been adverse to the UAW's purposes. Rather than simply securing a large number of signatures, the union attempted, through the pre-election poll, to gauge accurately the UAW's chances of ultimate success in the election. Furthermore, the company could produce no evidence that any employee felt pressured to vote in favor of union representation as a result of the poll so that the outcome of the election was influenced by the polling.

The company did offer testimony that some employees were asked more than once to sign the petition and that one employee was told that co-workers had wagered on whether he would sign the lists. Such evidence, however, does not establish coercion to sign or, more relevantly, coercion to vote for union representation in a secret ballot. Interestingly, the employees allegedly "badgered" to sign the petition stated unequivocally that no threats or coercion were involved in their conversations with co-workers and that they did not intend to vote for the union in any event, despite signing the petition. Furthermore, the employee claiming to be traumatized by his co-workers' bets on his signing testified that he did not, in fact, sign the petition. Because Keeler

has thus failed to meet its burden on this issue, the decision of the Board concluding that no unfair labor practice was committed in the circulation of the pre-election petition was proper.

2. *Posting of Campaign Materials in Voting Area*

Keeler next submits that the right of the employees to a fair and free election was compromised by the posting of pro-union campaign materials in the room where voting occurred. Specifically, the company alleges that fliers were placed between a window and a screen in a corner of the voting area only 15 feet from the voting booths themselves.

Recognizing that the "laboratory conditions" for which the Board strives in conducting elections are rarely attained, this court has stated that representation "elections are not automatically voided whenever they fall short of perfection." *NLRB v. Dickinson Press, Inc.*, 153 F.3d 282, 284 (6th Cir. 1998) (quoting *NLRB v. Duriron Co., Inc.*, 978 F.2d 254, 256 (6th Cir. 1992)). "Rather, the Board has broad discretion in determining whether election conditions allowed for the fair and free choice of bargaining representatives by employees." *Id.*

In this matter, the Board concluded that the failure to remove pro- union literature from the voting room prior to the conclusion of the morning election period did not taint the electoral freedom of the Keeler employees. First, absolutely no evidence was offered to indicate that any union official or employee was involved in the placement of the flyers. "The misconduct of a third party is given

less weight than that of a Union agent in determining whether an election should be set aside . . . because of the inability of unions and employers to prevent misconduct by persons over whom they have no control." *Id.* at 288.

Second, only three of the parade of company witnesses at the Board hearing testified that they had seen the objectionable literature during the morning voting period. In fact, an election observer noted that a company representative walked past the flyers on election day but made no comment about their presence. Even the company representative who eventually removed the offending paper claimed not to have noticed the flyers initially. Consequently, no evidence has been adduced by Keeler to refute the finding and recommendation of the hearing officer that any electioneering on the day of the balloting was insufficient to create an atmosphere precluding a fair and impartial election. *See, e.g., Colquest Energy, Inc.*, 965 F.2d at 120-21.

3. *Union Use of Information Recovered from the Trash*

In a third challenge to the conduct of the representation election, Keeler contends that the union and its supporters unscrupulously rummaged through the employer's trash to recover documents relating to management bonuses and capital improvements at the plant. According to the employer, the union then used that information to convey to the employees the impression that the union had access to internal company decision-making. An official with Keeler testified, however, that

the business had no rule against employees taking garbage and that any confidential documents that are not to be seen by others are shredded prior to being discarded. Furthermore, no evidence adduced before the hearing officer substantiated the allegation that the union or union sympathizers claimed to have received the relayed information from any special source not available to other employees as well. This challenge to the administrative decision of the Board and its hearing officer is thus also without merit.

4. *Union Use of Materials Allegedly Purporting to be Customer Endorsements*

Keeler next argues that the union intentionally misrepresented that customers of the company would be more likely to continue working with Keeler if the union were to win the representation election. In support of this allegation, the company points to "Union-crafted artifices" "allegedly from K[eeler] customers." As found by the hearing officer, however, even the most cursory of examinations of the two letters cited by the company would put any reasonable person on notice that the correspondence did not come from management officials of Keeler's customers.

The first of the two documents is a letter to Keeler employees on UAW stationery with a prominent UAW letterhead signed by UAW officials at Lionel Trains, Inc. Any person believing this letter to be a creation of Lionel management neither read the contents of the message nor even glanced at the document itself. Similarly, the second letter is another one-page document clearly signed by

employees of another plant, not by any management official. The record before this court is thus devoid of any evidence of union efforts to deceive Keeler employees regarding the feelings of company customers about the pending election. This challenge to the administrative ruling is patently without merit.

5. *Alleged Union Promise of a Keeler Employee Local*

The well-established law of this circuit holds that the Board "should not set aside an election on the basis of the substance of representations alone, but only on the deceptive manner in which representations are made." *Van Dorn Plastic Mach. Co. v. NLRB*, 736 F.2d 343, 348 (6th Cir. 1984). In its petition for review, therefore, Keeler contends that the UAW's promises to Keeler employees of their own local union organization so deceived those individuals that they were "unable to separate truth from untruth and where their right to a free and fair choice [was] affected." *Id.*

The record before this court, however, supports the conclusion of the hearing officer that the union never promised the Keeler employees their own local. Instead, the pre-election documents highlighted by the employer simply state that the employees, as union members, would elect their own representatives and would be ultimately responsible for the direction of union activities. Such campaigning, with its references to self-governance, is not inherently misleading and, furthermore, not inconsistent with the concept of the Keeler employees joining

with other employees in the area to direct grassroots, collective labor activities.

Changed Circumstances Affecting Certification of Bargaining Unit

Subsequent to the election at Keeler Die Cast's Stevens Street plant, the UAW sought to serve as the representative of employees at Keeler Brass Company, another Grand Rapids plant. Because the union apparently was unsuccessful in its bid in that later election, and because the UAW now contends that wages and benefits should be uniform at all of Keeler's three Grand Rapids plants, the employer insists that the limited bargaining unit certified for the Die Cast plant election should be recertified as a larger, and presumably more pro-management, electoral body. Keeler Die Cast and the UAW previously agreed, however, on the appropriate bargaining unit for the representation election at issue in this appeal. We decline to subvert that voluntary agreement by altering the stipulation signed by Keeler Die Cast, the UAW, and the regional director of the NLRB.

Election During Pendency of Unresolved Unfair Labor Practices

In a final issue on appeal, Keeler Die Cast curiously maintains that it should have been able to delay the representation election indefinitely by refusing to remedy a prior finding of an unfair labor practice at the Keeler Die Cast facility involving the company's "domination of, and provision of support to, an in-house organization." As noted by the Board in its ruling, however, Keeler

obviously knew of the prior violation and could have raised this issue prior to stipulating to the election that was held at the plant. Furthermore, the union victory in the election effectively moots the necessity of resolving the prior domination charge prior to voting.

CONCLUSION

The party desiring to overturn the results of a Board-conducted representation election bears a heavy burden in establishing the unfairness of that contest. In this case, Keeler Die Cast has failed to prove that any actions undertaken by the UAW or its agents so interfered with the employees' exercise of their free choice as to taint the electoral process and materially affect the results of the election. We therefore DENY Keeler's petition for review of the Board's finding of an unfair labor practice for refusing to bargain with the UAW and GRANT the Board's request for enforcement of its order.

NOTICE: This opinion is subject to formal revision before publication in the Board volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

NATIONAL LABOR RELATIONS BOARD

Keeler Die Cast *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL – CIO, Case 7-CA-40259

March 23, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND LIEBMAN

Pursuant to a charge and amended charge filed on September 29 and October 14, 1997, the General Counsel of the National Labor Relations Board issued a complaint on October 24, 1997, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 7-RC-20932. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs, 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On December 19, 1997, the General Counsel filed a Motion for Summary Judgment. On December 23, 1997, the Board issued an order transferring the proceeding to

the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer to the complaint and its response to the Motion for Summary Judgment the Respondent not only relies on the objections it filed to the election in the underlying representation case, but also makes two additional arguments. It contends (1) that the certification of the Union should not have issued because there was an unremedied unfair labor practice at the time of the election and (2) that the bargaining unit in which the Respondent will be ordered to bargain if the Motion for Summary Judgment is granted must be deemed inappropriate in light of a position the General Counsel is taking in a different pending unfair labor practice case.

Even accepting the factual premises of these contentions, we find no basis for denying the Motion for Summary Judgment. As to the first contention, the unremedied unfair labor practice to which the Respondent refers was the Respondent's own domination of, and provision of support to, an in-house organization (the "Keeler Brass Grievance Committee"), in violation of Section 8(a)(2) and (1) of the Act.[1] As the party that committed the violation and was ordered by the Board to remedy it, the Respondent obviously knew whether or not it had

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[1] *Keeler Brass Co.*, 317 NLRB 1110 (1995).

complied with that order, and therefore could have raised this point before the election. It did not, but rather stipulated to the election that was held. In any event, any contention that the election should now be set aside is meritless, since the Union whose certification the Respondent now attacks won the election notwithstanding the Respondent's unlawful support of the in-house committee. As for the Respondent's contention that the General Counsel is taking a position in another case which is inconsistent with the certification of the Union as the bargaining representative of a unit limited to employees at the Respondent's Stevens Street facility, the Respondent's proper course is to raise its argument in the other case. The Respondent stipulated to the appropriateness of the unit concerned here, and it has alleged no change in the unit that would warrant reopening the representation case to revisit the determination.

For these reasons, we find that all representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. *See Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation, with an office and place of business in Grand Rapids, Michigan (the Steven Street facility) has been engaged in the manufacture and nonretail sale of die cast automobile parts and furniture hardware. During the 1996 calendar year, the Respondent, in the course and conduct of its business operations, purchased and received at its Steven Street facility goods valued in excess of $50,000 directly from points located outside the State of Michigan. We find that the Respondent is an employer engaged in commerce within the meaning of section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held December 12, 1996, the Union was certified on September 3, 1997, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees including all leadmen, quality auditors and material handling clerks employed by the Employer at its facility located at 236 Stevens Street, S.W., Grand Rapids, Michigan, but excluding all office clerical employees, quality analysts, technical employees, professional employees, casual

employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under section 9(a) of the Act.

B. *Refused to Bargain*

Since September 9, 1997, the Union has requested the Respondent to bargain, and, since that date, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (i) of the Act.

Conclusion of Law

By refusing on and after September 9, 1997, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period

of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lantar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Keeler Die Cast, Grand Rapids, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL – CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

All full-time regular part-time production and maintenance employees including all leadmen, quality auditors and material handling clerks employed by the Employer at its facility located at 236 Stevens Street, S.W., Grand Rapids, Michigan, but excluding all office clerical employees, quality analysts, technical employees, professional employees, casual employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Grand Rapids, Michigan, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 7 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 9, 1997.

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[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Baord" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated. Washington, D.C. March 23, 1998

William B. Gould IV, Chairman

Sarah M. Fox, Member

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the act.

WE WILL, on request bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time production and maintenance employees including all leadmen, quality auditors and material handling clerks employed by Keeler Die Cast at our facility located at 236 Stevens Street, S.W., Grand Rapids, Michigan, but excluding all office clerical employees, quality analysts, technical employees, professional employees, casual employees, guards and supervisors as defined in the Act.

KEELER DIE CAST

98-5536/5635

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KEELER DIE CAST, Petitioner/Cross-Respondent, v. NATIONAL LABOR RELATIONS BOARD, Respondent/Cross-Petitioner, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO, Intervenor.	)	ORDER (Filed Sep. 17, 1999)

BEFORE: DAUGHTREY and MOORE, Circuit Judges; and STAFFORD,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

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*Hon. William H. Stafford, Senior United States District Judge for the Northern District of Florida, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

It is further ORDERED that the untimely supplemental statement of petitioner/cross-respondent in support of the petition not be accepted for filing.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Leonard Green, Clerk

Supreme Court, U.S.
FILED
FEB 9 2000
OFFICE OF THE CLERK

(2)

No. 99-985

In the Supreme Court of the United States

KEELER DIE CAST, PETITIONER

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that the union's solicitation of employees to express their support publicly for the union by signing a petition in advance of a scheduled certification election did not impair the employees' freedom of choice in determining whether to select union representation, and thus did not warrant setting aside the election result.

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In the Supreme Court of the United States

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KEELER DIE CAST, PETITIONER

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INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-13a) is reported at 185 F.3d 535. The decision and order of the National Labor Relations Board in the unfair labor practice proceeding (Pet. App. 14a-22a) is reported at 325 N.L.R.B. No. 79. The Board's underlying decision and certification of representative (App., *infra*, 1a-3a) is unreported. The hearing officer's report on petitioner's objections to the certification election (App., *infra*, 4a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 1999. A petition for rehearing en banc was denied on September 17, 1999 (Pet. App. 23a-24a). The petition for a writ of certiorari was filed on December 9, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On October 7, 1996, respondent, the United Automobile Workers (UAW or Union) filed with the National Labor Relations Board (Board) a petition for a certification election at the Stevens Street plant of petitioner Keeler Die Cast in Grand Rapids, Michigan. The Union and petitioner stipulated to the appropriate collective bargaining unit for the representation election. On December 12, 1996, the representation election was held and 174 of the 181 eligible employees voted; 95 employees voted for union representation and 79 employees voted against such representation. Pet. App. 3a-4a.

Petitioner filed six objections to the election based on the Union's preelection conduct. A hearing was conducted and the hearing officer recommended to the Board that all of petitioner's objections be overruled and that a certification of representative issue. App., *infra*, 4a-22a. The Board adopted the hearing officer's recommendation and certified the Union as the representative of petitioner's unit employees. *Id.* at 1a-3a.

a. In this Court, petitioner challenges only the overruling of its objection based on the Union's solicitation of employees to declare their support publicly for the Union prior to the scheduled Board election. The facts relating to that objection are as follows.

The Union solicited employee signatures on two separate petitions during the organizational campaign. The first petition was used by the Union to establish the requisite showing of interest needed to invoke the Board's election processes.[1] The second petition, which is the subject of petitioner's objection, was circulated a few weeks before the election by employee supporters of the Union, who requested that their co-workers sign it if they intended to vote for the Union in the election. App., *infra*, 9a.

Each sheet of the second petition carried a caption at the top which read:

> We, the undersigned employees of Keeler Die Cast are voting YES on election day. We have heard all the company's arguments and accusations and we have listened to their promises. But we are standing up for ourselves, our families and our futures. YES for justice. YES for dignity. YES for a voice in our work place.

Pet. App. 6a. In a frame at the bottom of each sheet was a provision which read:

> I understand that my signature will be used in a leaflet or in any other way that shows my commitment to taking charge of my own future.

Ibid. A union organizer told the employees circulating the second petition that it was "to gauge whether there was enough support for the Union," and that if "there wasn't enough support for the formation of the Union,

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[1] In the case of a petition filed by a labor organization seeking certification, the Board will ordinarily not proceed to an election unless the petitioner shows that it has been designated by at least 30% of the employees in the bargaining unit to represent them. See 29 C.F.R. 101.17, 101.18.

then it was no sense having an election." C.A. App. 73; see also *id.* at 74-75, 77-78. The organizer gave the same explanation in a letter dated December 3, 1996, which he sent to all employees. *Id.* at 222-223.[2]

The signatures of 102 employees were obtained on individual sheets, which were then returned to the Union for incorporation into a single document. Copies of the document were distributed to employees during a shift change the day before the election. No evidence was presented before the Board indicating that any of the signatures were forged, although two employees signed the petition twice. Some witnesses testified that they were told that the Union intended to cancel the election if an insufficient number of employees signed the second petition. App., *infra*, 10a. No evidence was presented to the Board establishing that employees were coerced into signing the second petition by means of threats, intimidation or promises of benefits. Petitioner elicited testimony, however, that one employee held the petition for five days before signing it, that another employee was asked on three separate occasions to sign the petition, that one employee was told that a wager had been made that he could be convinced to sign the petition, and that another employee was told that he had to sign the petition. *Ibid.*

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[2] The letter, in relevant part, stated: "If a majority won't sign the petition, it indicates you can't win an election and there is no sense having an election if you can't win. It wouldn't be fair to freeze you out for another year with no opportunity for another election." C.A. App. 223. Section 9(c)(3) of the National Labor Relations Act, 29 U.S.C. 159(c)(3), prohibits the Board from directing an election "in any bargaining unit * * * within which in the preceding twelve-month period, a valid election shall have been held."

b. The hearing officer's recommendation that petitioner's objection to the second petition be rejected was based on the well settled principle that a union's poll of employees to determine support for an upcoming Board election is permissible so long as the union does not engage in coercion in connection with the polling. App., *infra*, 11a (citing *Glamorise Found., Inc.*, 197 N.L.R.B. 729 (1972); *Springfield Hosp.*, 281 N.L.R.B. 643 (1986); *Omni Manor, Inc.*, 309 N.L.R.B. 693 (1992)). The officer found that neither the Union's polling of employees via the second petition, nor its publishing of the results as a means of expanding and solidifying support, was *per se* objectionable conduct. App., *infra*, 11a-12a; see *Kusan Mfg. Co.* v. *NLRB*, 749 F.2d 362, 364 (6th Cir. 1984).

The hearing officer rejected petitioner's contention that the Union coerced employees by threatening to cancel the election. He explained that, under the Board's rules (29 C.F.R. 102.60(a)), the Union had a right to request withdrawal of its election petition, but such withdrawal was subject to the approval of the regional director and would not be granted if employee rights would be adversely affected. App., *infra*, 12a-13a.

The hearing officer also rejected petitioner's contention that the second petition falsely and deceptively portrayed the Union's support in the unit. Noting that petitioner presented testimony from several witnesses that they signed the petition even though they had no intent to vote for the Union at the election, the hearing officer stated that the Union could not be held responsible for the fact that "some employees may have signed the second petition for some reason other than to reflect their true intent at the time of signing," especially since "no evidence was presented to indicate that

[the Union] intentionally misrepresented its support or that any employee was coerced into signing the petition." App. *infra*, 13a-14a.

Finally, the hearing officer found unconvincing the testimony of some witnesses that they were misled into signing the petition because they had been told that their signatures would not be published. He explained: "Each page of the petition carried a printed portion at the bottom of each page which stated 'I understand that my signature will be used in a leaflet or in any other way that shows my commitment to taking charge of my future.' If any employee had any question how their signature might be used after reading this portion of the petition, or if they failed to read this section before signing, the misconception was corrected by [the Union's] letter of December 3." App., *infra*, 14a. That letter "was sent to all unit employees while the second petition was being circulated," and stated that "by signing the second petition, 'you are giving permission to use your name in a leaflet indicating your support.'" *Ibid.*

Therefore, the hearing officer recommended that petitioner's objection to the December 12, 1996 election, based on the second petition, be overruled. As noted above, the Board adopted that recommendation, as well as the hearing officer's recommendation to reject petitioner's other objections, and it certified the Union.

c. After issuance of the Board's certification, petitioner refused the Union's request to bargain. Pet. App. 18a. The Union then filed an unfair labor practice charge with the General Counsel of the Board. The General Counsel issued a complaint alleging that petitioner had violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(5) and (1). The Board upheld the allegations of the

complaint and ordered petitioner to bargain with the Union. Pet. App. 14a-22a.

2. The court of appeals enforced the Board's order. Pet. App. 1a-13a. The court rejected petitioner's several arguments, including its contention that the second petition was inherently coercive. *Id.* at 5a. The court disagreed with petitioner's reliance on *NLRB* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973), and found that "the actions of the UAW in the present case do not involve the inducements and coercion described" in *Savair*. Pet. App. 6a. Rather, the Union, "in an effort to ascertain the level of its support among employees prior to the date of the election, simply asked employees to sign sheets that stated clearly" that the signer was "voting YES on election day," and that the signer understood that "my signature will be used in a leaflet or in any other way that shows my commitment to taking charge of my own future." *Ibid.*

The court noted that a union's pre-election polling is not inherently coercive and cannot be successfully challenged unless the employer establishes that such polling "*in fact* was coercive and *in fact* influenced the result of the election." Pet. App. 6a-7a (quoting in part *Kusan Mfg. Co.* v. *NLRB*, 749 F.2d 362, 365 (6th Cir. 1984)). The court emphasized that, here, the Union did not have an interest in coercing employees to sign the second petition because the Union was attempting to gauge its chances of election success and pressuring employees to sign would have been adverse to the Union's purpose. Pet. App. 7a. Furthermore, the court found that, although petitioner "offer[ed] testimony that some employees were asked more than once to sign the petition and that one employee was told that co-workers had wagered on whether he would sign the lists," such evidence "does not establish coercion to sign

or, more relevantly, coercion to vote for union representation." *Ibid.* Indeed, "the employees allegedly 'badgered' to sign the petition stated unequivocally that no threats or coercion were involved in their conversations with co-workers and that they did not intend to vote for the Union in any event, despite signing the petition." And "the employee claiming to be traumatized by his co-workers' bets on his signing testified that he did not, in fact, sign the petition." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. Petitioner erroneously contends (Pet. 5) that the decision below conflicts with *NLRB* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973). In *Savair*, a union announced a waiver of its initiation fee before an election. The waiver applied only to employees who signed union recognition slips before the election. *Id.* at 272-273. The Court held that the selective fee waiver impermissibly interfered with employee free choice to vote for or against union representation. First, the union was able to "buy endorsements" and thus "paint a false portrait of employee support during its election campaign." *Id.* at 277. Second, some employees may have felt obligated, when they subsequently voted in the election, "to carry through on their stated intention to support the union." *Id.* at 278.

The court below properly concluded (Pet. App. 6a) that "the actions of the UAW in the present case do not involve the inducements and coercion described in *Savair*." The Union did not offer petitioner's employees an economic benefit if they signed the second

petition indicating that they intended to vote for the Union on election day. Rather, as the court below noted (*id.* at 7a), "the union attempted, through the pre-election poll, to gauge accurately the UAW's chances of ultimate success in the election." Moreover, as the court found (*ibid.*), petitioner, which had the burden of proof on this issue,[3] produced no evidence that any employee was coerced to sign the petition, or, "more relevantly, [was coerced] to vote for union representation in a secret ballot." *Ibid.*

Petitioner contends (Pet. 6), however, that the Union improperly induced employees to sign the second petition by "telling them if they did not sign the petition, there would be no election and they would effectively be disenfranchised," which "caused employees who would not have otherwise signed the document to sign it, thus creating the false portrait of support condemned in *Savair*." That contention is not borne out by the facts of this case. The second petition, on its face, provided a strong disincentive to any employee's signing it if he or she did not actually intend to vote for the Union in the election. The petition contained not only an express declaration that the signer intended to vote "yes," but also expressly authorized the Union to publicize that fact by using his or her signature in the Union's campaign literature. Accordingly, there is no reason to believe that the petition reflected a "false" level of employee support for the Union. See *Savair*, 414 U.S. at 277.

Furthermore, the Union's purported "threat" to cancel the election was, in fact, a promise to press for an

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[3] See *NLRB* v. *Mattison Machine Works*, 365 U.S. 123, 124 (1961); *Dayton Hudson Dep't Store Co.* v. *NLRB*, 987 F.2d 359, 363 (6th Cir. 1993).

election, at such time as an election made strategic sense for the Union and its supporters. In its December 3, 1996, letter, which was sent to employees while their signatures were being solicited on the second petition, the Union was unequivocal in its commitment to organizing petitioner. See C.A. App. 222-223. The December 3 letter made it clear to employees that the Union intended to proceed to an election at some point in time; the only issue was whether it would make sense to proceed with the election on the scheduled date, in the event that petitioner's counter-campaign to erode employee support for the Union had been successful. Thus, the Union's letter clearly explained:

> [O]nce you have an NLRB election, you cannot have another one for a year. That is why the company is trying so hard to get you to vote against your best interest. * * * [Y]our election is much to [*sic*] important to take any chances with. You need to know that you can win and more importantly, that [company] workers are sticking together—to make Keeler Die Cast a better, more productive place to work.

Ibid. And, so as to leave no doubt about the Union's intentions, the letter closed by emphasizing that "*[y]ou [the employees] are going to be the union at Keeler Die Cast*" but "there is no sense having an election if you can't win. It wouldn't be fair to freeze you out for another year with no opportunity for another election." *Id.* at 223; see note 2, *supra.* In these circumstances, the Board reasonably concluded that the Union, which had the right to request withdrawal of its election petition under the Board's rules (see p. 5, *supra*), did not engage in objectionable conduct by advising employees that it would not proceed to an election unless a

sufficient number of employees manifested their continued support for the Union by signing the second petition. Indeed, as the court below noted (Pet. App. 7a), the Union "had absolutely no interest in coercing employees to sign the petition" because the Union's reason for procuring the petition, which was fully disclosed to the employees—namely, to plot its election strategy—depended upon the petition's providing an accurate measure of employee support.

Petitioner also contends that the finding of the court below that the second petition, standing alone, was not coercive ignores the teaching of *Savair* that "[a]ny procedure requiring a 'fair' election must honor the right of those who oppose a union as well as those who favor it." Pet. 8-9 (quoting *Savair*, 414 U.S. at 278). According to petitioner (Pet. 9), employees "opposing the union, or even those who were at the time undecided as to their preference, were required to sign this petition stating their intention to vote for the Union or else not be afforded the opportunity to vote at all."

As explained above, however, the Union did intend to proceed to an election; it circulated the second petition to determine whether to proceed to an election on the scheduled date or, instead, to seek to postpone an election until a later time. Nothing in *Savair* suggests that employees opposing the union, or those who are undecided, have a right to require the union and its employee supporters to proceed to an election at any particular time.

Finally, there is no merit to petitioner's assertion (Pet. 18) that the second petition was "false" because the Union promised employees that "their names would not be made public" if they chose to sign it. Although some witnesses testified that they were misled into

signing the second petition by being told, *inter alia*, that their signatures would not be published, the hearing officer found that testimony not "convincing." App., *infra*, 14a. As explained above (at p. 6), the specific language of the petition itself and the discussion of that language in the Union's December 3, 1996, letter (which was sent to all unit employees while the petition was being circulated) made it clear that employees "should have realized that their signatures might be used by the [Union] in its campaign literature." *Id.* at 15a.[4]

2. Petitioner contends (Pet. 12-18) that the decision of the Sixth Circuit in this case conflicts with that court's decision in *NLRB* v. *Gormac Custom Manufacturing Co.*, 190 F.3d 742 (1999). But the *Gormac* court itself recognized that the two decisions are factually distinguishable.

First, the *Gormac* court explained that, in the instant case, "employees did explicitly agree to 'vote yes' (nonbinding though it was) and to have their signatures used in a leaflet to let others know that they would 'vote yes'" (190 F.3d at 748); whereas in *Gormac*, "though the three employees signed an authorization card which gave the [union] permission to use their names on flyers, at no time did they agree to 'vote yes'

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[4] Petitioner's reliance (Pet. 10-11) on *NLRB* v. *Roney Plaza Apartments*, 597 F.2d 1046 (5th Cir. 1979), is misplaced. There, the court found that union adherents planned from the outset to tell each employee solicited to sign a union authorization card that all of the other employees had already signed, and that, consistent with this strategy, nearly all of the cards were obtained in one day. The court thus concluded that the cards had been procured through a "concerted plan of serious misrepresentation." *Id.* at 1052-1053. By contrast, the hearing officer found that the Union here did not engage in any misrepresentation in soliciting signatures to the second petition. App., *infra*, 13a-14a.

for the union or to allow their signatures to be used to encourage others to 'vote yes'." *Ibid.* Second, the *Gormac* court noted that, in the instant case, the court had "held that no showing of coercion had been made"; whereas in *Gormac*, "there was a prima facie showing of coercion * * * by the Union in its pre-election polling activities." *Id.* at 750. Moreover, in the instant case, "there were no misrepresentations made in order to get more employees to sign the authorization card, as occurred [in *Gormac*]," "the language on the 'petition' was materially different," and (unlike in *Gormac*) the Board granted the employer an evidentiary hearing on its objection. *Ibid.* Finally, the *Gormac* court remanded the case to the Board for an evidentiary hearing without passing on the validity of the employer's election objection. *Id.* at 751.

In any event, even if petitioner's contention were correct, an intra-circuit conflict provides no basis for this Court's intervention. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

LINDA SHER
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel
National Labor Relations Board

FEBRUARY 2000

APPENDIX A

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case GR-7-RC-20932

KEELER DIE CAST, EMPLOYER

AND

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO, PETITIONER

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board has considered objections to an election held December 12, 1996, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 95 for and 79 against the Petitioner. There were no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's

findings and recommendations[1], and finds that a certification of representative should be issued.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees including all leadmen, quality auditors and material handling clerks employed by the Employer at its facility located at 236 Stevens Street, S.W., Grand Rapids, Michigan; BUT EXCLUDING all office clerical employees, quality analysts, technical employees, professional employees, casual employees, guards and supervisors as defined in the Act.

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[1] We adopt, pro forma, in the absence of exceptions, the hearing officer's recommendation that the Employer's Objections 4 and 5 be overruled.

Dated, Washington, D.C., September 3, 1997.

William B. Gould IV, Chairman

Sarah M. Fox, Member

John E. Higgins, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

Case GR-7-RC-20932

KEELER DIE CAST, EMPLOYER

AND

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO, PETITIONER

HEARING OFFICER'S REPORT AND RECOMMENDATIONS TO THE BOARD ON OBJECTIONS TO CONDUCT AFFECTING RESULTS OF ELECTION

Upon a petition filed on October 7, 1996,[1] and pursuant to a Stipulated Election Agreement executed by the parties and approved by the Regional Director of Region 7 of the National Labor Relations Board on November 6, an election by secret ballot was conducted on December 12, among the employees in the following appropriate collective bargaining unit:

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[1] All dates refer to 1996 unless otherwise noted.

All full-time and regular part-time production and maintenance employees including all leadmen, quality auditors and material handling clerks employed by the Employer at its facility located at 236 Stevens Street, S. W., Grand Rapids, Michigan; BUT EXCLUDING all office clerical employees, quality analysts, technical employees, professional employees, casual employees, guards and supervisors as defined in the Act.

The payroll period for eligibility was the weekly period ending, Sunday, October 27.

Upon the conclusion of the count of ballots, a copy of the Tally of Ballots, indicating the following results, was made available to each of the parties in accordance with the Rules and Regulations of the Board:

Approximate number of eligible voters	181
Void ballots	0
Number of votes cast for Petitioner	95
Number of votes cast against participating labor organization	79
Number of valid votes counted	74
Number of challenged ballots	0
Number of valid votes counted plus challenged ballots	174

THE OBJECTIONS

On December 19, the Employer timely filed "Employer's Objections To The Union's Pre-Election Conduct," a copy of which was served by the Grand Rapids Resident Office upon the Petitioner on the same date. The Employer's objections allege as follows:

> "1. During the time in which laboratory conditions were in effect, the UAW as a matter of policy coercively required employees to openly and publicly state how they were going to vote in the election, in a binding and unambiguous manner and upon penalty of canceling the election, and within 24 hours prior to the election disclosed the results of that vote by individual employee. The UAW's conduct is highly objectionable for several reasons, including but not limited to the fact that it destroys the integrity of the secret ballot; undermines the exclusive authority of the NLRB and its established safeguards and processes by effectively placing the UAW in control of the election process; is in gross disregard of the employees' Section 7 rights to freely, fully, and privately participate in the process without fear of retribution; and because the votes were obtained through coercion, inducements, and misrepresentations, union support was not only falsely but deceptively portrayed.
>
> 2. The Union electioneered at the polls by posting campaign propaganda in outside windows of the polling area in clear view of all voters throughout the first voting session.

3. On December 6, 1996, the Union stole privileged, confidential Company memoranda and published it for propaganda purposes and to misrepresent to employees that it had unique access to Company files and information.

4. Within 24 hours of the election the Union published what purported to be a promise by key customers of enhanced job security if the Union was elected to represent employees.

5. The Union falsely promised employees that if it was elected, employees at Keeler Die Cast would have their own local UAW union and would not be a part of an amalgamated local.

6. By the above and other conduct, the Union interfered with, coerced, and restrained employees in the exercise of their Section 7 rights and interfered with their ability to exercise a free and reasoned choice in the election."

On January 8, 1997, the Region [*sic*] Director issued a Report and Notice of Hearing on Objections to Conduct Affecting the Results of the Election, directing that a hearing be held before a hearing officer designated by the Regional Director for the purpose of resolving the issues raised by the Employer's objections. The hearing officer was directed to prepare and cause to be served on the parties a report containing resolutions of credibility of the witnesses, findings of fact, and recommendations to the Board as to the disposition of the objections.

Accordingly, on January 29 and 30, 1997, a hearing was held pursuant to said Notice in Grand Rapids,

Michigan before the undersigned hearing officer duly designated for the purpose of conducting such hearing. The hearing was conducted in accordance with the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended. The Employer and the Petitioner entered appearances and were afforded full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce any relevant evidence bearing on the issues presented by the Employer's Objections.

Upon the entire record in this case[2], and from my careful observations of the demeanor and manner of the witnesses while testifying under oath, I make the following findings:[3]

Objection No. 1

Objection 1 alleges that Petitioner coercively required employees to openly state how they intended to vote in the representational election. The Employer argues that employees were coerced into signing this

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[2] On February 18, 1997, the Employer filed a motion to correct the transcript. The motion contained 28 paragraphs noting an alleged error in each paragraph. On February 29, 1997, the Petitioner filed an objection to the paragraphs 1, 4, 5, 6, 9, 14, 17, 18 and 21 of the Employer's motion. After a careful examination of the transcript, I hereby grant the Employer's motion in its entirety and over the Petitioner's objection to the paragraphs noted above.

[3] In the resolution of all issues for which the credibility of oral testimony becomes a factor, I have carefully considered the demeanor and the conduct of the witnesses, as well as their candor, their objectivity, their bias or lack thereof and have carefully weighed the witnesses' understanding of the matters to which they have testified, the plausibility, consistency and probability of their testimony, as well as whether parts of their testimony should be accepted when other parts are rejected.

petition by the Petitioner's threat to cancel the election if an insufficient number of employees failed to indicated [*sic*] their intent to vote for the Petitioner at the election. It contends that the Petitioner distributed the results of the poll to employees within 24 hours of the election and that the polling falsely and deceptively portrayed the results of the poll. It argues that both the polling and the publishing of the results of the poll constitute objectionable conduct by destroying the integrity of the secret ballot election, placing the Petitioner in control of the election process, undermining the Board's authority to conduct elections, and disregarding the employee right to participate in the election without fear of retribution.

The evidence reveals that the Petitioner solicited employee's signatures on two separate petitions during the organizational campaign. The first petition was used to establish the requisite showing of interest needed to invoke the Board's election processes. The other petition, herein referred to as the "second petition," was used by the Petitioner to gauge its support immediately prior to the election. Employees that supported the Petitioner circulated the second petition and requested that employees sign it if they intended to vote for the Petitioner at the election.

Each sheet of the petition carried a caption at the top which reads as follows:

> "We, the undersigned employees of Keeler Die Cast are voting YES on election day. We have heard all the company's arguments and accusations and we have listened to their promises. But we are standing up for ourselves, our families and our future,

> YES for justice, YES for dignity, YES for a voice in our work place."

In a frame at the bottom of each sheet was a section which read as follows:

> "I understand that my signature will be used in a leaflet or in any other way that shows my commitment to taking charge of my future."

After the signatures were obtained, the individual sheets were returned to the Petitioner and incorporated into one single document consisting of 10 pages, Employer's Exhibit 2. The petition contains the signatures of 102 employees. No evidence was presented indicating that any of the signatures were forged, although two employee [*sic*] did sign the petition twice. Copies of the petition were distributed to employees during a shift change the day prior to the election. Approximately 100 copies of the petition were made and distributed in this manner. Some witnesses testified that they were told that the Petitioner intended to cancel the election if an insufficient number of employees signed the second petition.

No evidence was presented to establish that employees were coerced into signing the petition by the traditional means of threats, intimidation or promises of benefits. The Employer did, however, elicit testimony that one employee held the petition for five days before signing, that another employees [*sic*] was asked on three separate occasion [*sic*] to sign the second petition, that one employee was told that a wager had been made that he could convince the employee to sign the petition, and that another employee was told that he had to sign the petition. It is important to note that no

witness testified he was threatened with any adverse consequences or offered any inducement to sign the petition.

In *J. C. Penny Food Department*, 195 NLRB 921 (1972) the Board held that a union did not commit objectionable conduct by polling employees. In *Penny* the Board drew a distinction between an employer engaging in such conduct and a union engaging in the same conduct and found that an employer would indeed engage in objectionable conduct by polling its employees while a union would not. The disparate treatment rests upon the fact that employers have the ability to affect employees terms and conditions of employment while unions do not. Since *Penny*, unions have been permitted to poll employees to determine support for an upcoming election as long as they do not engage any acts of coercion in connection with the polling. See, *Glamorise Foundation, Inc.*, 197 NLRB 729 (1972); *Springfield Hospital*, 281 NLRB 643 (1986); and, *Omni Manor, Inc.*, 309 NLRB 693 (1992).

In *Kusan Mfg. Company*, 267 NLRB 740 (1983) the Board was presented with a factual situation quite similar to the facts herein. Therein, the union solicited employees to sign a petition evidencing their support a few days prior to the Board election. Thereafter, the union copied the petition and distributed it to employees at the employer's facility. The Board affirmed the administrative law judge, without comment, who found that the union did not engage in objectionable conduct either by conducting the poll or publishing the results to unit employees before the election. Based upon *Kusan*, I find that neither Petitioner's polling of

employees or its publishing of the results are *per se* objectionable conduct.

I find that the Employer's evidence that employees were coerced into signing the second petition by being asked on more than one occasion to sign the petition, being told that there was a bet that the employees would sign, and being told to sign the second petition is insufficient to establish that those employees were coerced by the Petitioner into signing the petition.

The Employer did not present any evidence to establish that any employee was coerced during polling by threats, promises or any other intimidating conduct. It did, however, attempt to present evidence that employees subjectively felt intimidated by being requested to sign the second petition. This evidence is incompetent to establish that the Petitioner tainted its polling of employees. The Board has consistently held that when judging such conduct an objective standard must be used and that the subjective feelings of employees is irrelevant. See, *Hopkins Nursing Home*, 309 NLRB 958 (1992) ft. 4; *Picoma Industries, Inc.*, 296 NLRB 498 (1989) at 499; and, *Worths Stores Corp.*, 281 NLRB 1191 (1986).

The Employer argued that Petitioner nonetheless coerced employees by threatening to cancel the election. I reject this argument and find that any comment made by the Petitioner indicating that it would cancel the election was insufficient to convert the polling to objectionable conduct. Under Section 102.60(a) of the Board's Rules and Regulations, petitioners have the right to submit a request to the Regional Director to withdraw their underlying election petition. All such withdrawal requests are, however, subject to the ap-

proval of the Regional Director and will not be approved if they adversely affect the rights of the employees. If approval of a withdrawal request would not effectuate the purposes of the Act, the Regional Director would not approve it, and the election would continue as scheduled. The Employer is attempting to establish objectionable conduct based upon a right granted the Petitioner under the Board's Rules and Regulations. I find that the Petitioner did not engaged [*sic*] in objectionable conduct by advising employees that it might attempt to cancel the election since any such withdrawal request would have to be approved by the Regional Director.

The Employer argued that the second petition falsely and deceptively portrayed the Petitioner's support in the unit and thus constituted objectionable conduct. In support of this argument the Employer presented testimony from several witnesses indicating that they signed the petition even though they had no intent to vote for the Petitioner at the election. Each of these witnesses testified that they were asked if they wished to sign the petition and none testified that they were threatened with any adverse action or that they were offered any inducement to sign the petition. Additionally, no evidence was presented to establish that any of the witnesses advised the Petitioner that they were signing the second petition even though they had no intent of voting for it in the election. The Petitioner had the right under settled Board law to conduct the poll of employees' sentiments and to distribute the results. The fact that some employees may have signed the second petition for some reason other than to reflect their true intent at the time of signing cannot be held against the Petitioner especially since no evidence

was presented to indicate that the Petitioner intentionally misrepresented its support or that any employee was coerced into signing the petition.

Even if the second petition may have misrepresented the strength of the Petitioner, I do not find its publication as objectionable conduct. The Board has long held that it will not judge the misrepresentations of the parties' propaganda during an organizational campaign. *Midland National Life Ins. Co.*, 263 NLRB 127 (1982). The only exception to this rule is found where the propaganda is so artfully drawn that the employees could not determine the truth. See, *Aero Ind., Inc.*, 314 NLRB 741 (1994), and *Care Enterprises, Inc.*, 306 NLRB 491 (1992). The petition was clearly from the Petitioner, and I find that its truthfulness could be adequately judged by the employees.

Some witnesses did testified [*sic*] that they were mislead [*sic*] into signing the petition by being told that their signatures would not be published. I do not find this testimony convincing. Each page of the petition carried a printed portion at the bottom of each page which stated that "I understand that my signature will be used in a leaflet or in any other way that shows my commitment to taking charge of my future." If any employee had any question how their signature might be used after reading this portion of the petition, or if they failed to read this section before signing, the misconception was corrected by Petitioner's letter of December 3, Employer Exhibit 1. This letter was sent to all unit employees while the second petition was being circulated. It states that by signing the second petition, "you are giving permission to use your name in a leaflet indicating your support." Accordingly, I find

that the employees chose to sign the petition of their own free will and they should have realized that their signatures might be used by the Petitioner in its campaign literature.

At hearing and in its brief the Employer argued that employees who signed the second petition were require [*sic*] to vote for the Petitioner at the election. I reject this argument as unfounded. The fact that an employee signed the petition does not require the employee to vote for the Petitioner. When employees cast their ballot at a Board conducted election, they do so in secret and they vote their own conscience. This would be no less so because the employee signed the second petition. The signing of the petition reflected no more than the employee's expressed intent to vote for the Petitioner at the time the document was signed and was not legally binding. This conclusion was clearly evidenced by some of the Employer's own witnesses who testified that they signed the petition even though they had no intent to vote for the Petitioner at the election.

For the above reasons, Employer's Objection 1 is hereby overruled.

Objection No. 2

Objection 2 alleges that the Petitioner engaged in electioneering during the first voting session of the election by posting campaign literature in the voting area.

The election was conducted in the Employer's lunch room at two separate sessions on Thursday, December 12. The first session was held from 6:30 a.m. to 8:00

a.m. The Employer presented evidence that employee Michael Raffler reported to work at 3:00 a.m. on the day of the election. At about 4:00 a.m. he went in the lunchroom for his break. While in the lunchroom, he noticed that two of Petitioner's campaign flyers, Employer's Exhibit 3 and 4, had been placed in the lunchroom windows. The windows are covered by screens, but there was a small crack between the window casing and the screen which was apparently use to inset the flyers. Raffler voted at the morning session at about 7:00 a.m. As he left the voting area he noticed that the flyers were still in the window. These flyers remained in the lunchroom windows until the 9:00 a.m. break when they were removed by Paulette Krebill, Employer's human resource manager, and another employee. The flyers were not in the lunchroom windows at the time of the second voting session. No evidence was present indicating who placed the flyers in the window.

Without evidence establishing that the Petitioner or one of its agents placed the flyers in the windows, this conduct must be judged upon the third party standard established by the Board. Under this standard the conduct can only be considered as objectionable if it created an atmosphere of hostility which precluded a fair and impartial conduct of the election. See *Dunham's Athleisure Corp.*, 315 NLRB 689 (1994); *O'Brien Memorial*, 310 NLRB 942, ft. 1 (1993); and, *Westwood Horizon Hotel*, 270 NLRB 802, 803 (1984). I find that the posting of the two flyers in the polling area did not create such an atmosphere, and the mere fact that flyers supporting the Petitioner were in the polling area during the first polling session is insufficient to

establish objectionable conduct or justify setting the election aside.

For the above reason, Objection 2 is hereby overruled.

Objection No. 3

Objection 3 alleges that the Petitioner stole confidential documents from the Employer, published them to the employees in the unit and thereby misrepresented to the employees that it had unique access to Employer files and information.

The evidence presented to support this objection indicates that some employees went through the Employer's trash and discovered documents that the Employer had discarded. One document, Exhibit 5, was faxed to Petitioner and was distributed to the employees. The document indicates that the Employer was conducting a meeting to review a video in preparation for the Employer's 24-hour speech to employees. This document was acknowledged as authentic by the Employer and it did not contend that it was misleading in nature.

Employee Karl Wiltse testified that at some unspecified time prior to the election he had a conversation with employee Tim Hill in which Hill told him that he found a document in the trash indicating that the Employer spent $129,000 to remodel the front office, that he was subsequently shown the document by Hill, and that the document indicated that $30,000 had been spent during remolding [*sic*] and that there was $129,000 left in the account. No evidence was presented to indicate that this document was not authentic.

Additional evidence was presented that someone, not the Petitioner, posted a document indicating that Employer's managerial employees received bonuses. No evidence was presented to indicate that bonuses were not given to these employees or that the amount of the bonuses was incorrect.

The evidence clearly establishes that employees rummaged through the Employer's trash and found documents that were subsequently used by the Petitioner, or employees that apparently supported the Petitioner in the election. Contrary to the Employer, I do not find that this evidence establishes that the Petitioner had unique access to confidential information. The Board does not condone the use of purloined documents or documents scavenged from the trash, but I do not view the Petitioner's use of documents so obtained as objectionable conduct calling for the setting aside of the election.

For the above reasons, Objection 3 is hereby overruled.

Objection No. 4

Objection 4 alleges that the Petitioner distributed to employees what purported to be endorsements by customers of the Employer.

This objection centers around Employer's Exhibits 6 and 7 which were distributed to the employees by the Petitioner during its organizational campaign. The Employer presented testimony from three witnesses indicating that they believed, at least initially, that Exhibit 6 came from Lionel Trains, Inc., a customer of the Employer. No testimonial evidence was presented

regarding Exhibit 7. I find that neither the exhibits nor the testimony regarding Exhibit 6 is sufficient to establish objectionable conduct.

When Exhibit 6 is examined it is clear that the letter is not from Lionel but from International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local No. 417. The letter is on Local 417's stationery which is clearly evidenced by the letterhead. It is signed by the president and bargaining chair of the local. It is not on Lionel stationery or signed by anyone purporting to be an agent of Lionel. The only portion of the letter which might possibly give rise to an inference that the letter came from Lionel is the phrase in the first sentence stating that the Employer "is one of our suppliers." Any inference that this letter might be from Lionel is negated by a cursory examination of the letter itself. This letter was not from Lionel and could not reasonably be assumed to have come from Lionel. It is a piece of propaganda distributed by the Petitioner during its organizational campaign and would be seen as such by the average employee in the unit.

The Employer's arguments regarding Exhibit 7 are similarly flawed. Even a casual examination of this exhibit reveals that it is propaganda from the Petitioner designed to convince employees to support it in the election. The letter is addressed to employees in the unit, signed by "Your Fellow UAW Supporters," and encourages support for the Petitioner. Nothing in the document indicates that it is from any employer let alone from one of the Employer's customers. Clearly, this document was part of the Petitioner's attempt to convince employees to vote for it in the election and

would not have been viewed otherwise by the employees. It is not so artfully drawn that it would deceive any employee from discerning its origins.

This objection is simply not supported by the facts presented at hearing. Accordingly, this objection is hereby dismissed.

Objection No. 5

This objection alleges that the Petitioner promised employees that they would have their own local and not be part of an amalgamated local.

The Employer did not present any testimonial evidence to establish that any employee was promised a separate local union if the Petitioner prevailed at the election. It did, however, argue in its brief that Employer's Exhibits 5, 9 and 10 establish that the Petitioner promised employees their own local. Employer further argued in its brief that obvious benefits arise from having an individual local, i.e. the use of local funds, election of local officers and other issues of local authority.

I do not find these arguments persuasive. There was no specific promise made by the Petitioner that the employees would have their own local union and I do not find that the flyers used by the Petitioner during the campaign support Employer's arguments. Even if such a promise was made, I do not see this as an inducement sufficient to justify setting the election aside. Clearly, a local would have the authority to use its funds and elect its own officers, but no evidence was presented to establish that the results would be different if the Employer's employees were included in

an amalgamated local. They would have the same basic right to elect their own representatives and decide how their local dues would be spent. Without some meaningful inducement to bribe the employees to vote for it, the Petitioner cannot be found to have engaged in objectionable conduct.

For the above reason, Objection 5 is hereby dismissed.

Objection No. 6

The last objection presented by the Employer is a catchall objection including the allegations of Objections 1 to 5, above, and "other conduct." No evidence of any other conduct was presented by the Employer or argued in its brief as objectionable. Accordingly, without regard to the sufficiency of this objection itself, it will be overruled based upon the total lack of evidence presented to establish objectionable conduct not covered by Objections 1 through 5.

RECOMMENDATION

Based upon the foregoing and the record as a whole, I recommend that all of the Employer's objections be overruled and that a Certification of Representative issue.[4]

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[4] Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions may be files [*sic*] with the Board in Washing [*sic*], D. C. 20570, with copies being served on all of the parties, including the Regional Director of Region 7. Exceptions must be received by the Board in Washington, D. C. by May 28, 1997.

Signed at Grand Rapids, Michigan, this 14th day of May, 1997.

/s/ HOWARD M. DODD
Howard M. Dodd, Hearing Officer
National Labor Relations Board
Region Seven
Grand Rapids Resident Office
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